Semantan Estate (1952) Sdn Bhd v Kerajaan Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-414–08 OF 2019
KAMALUDIN MD SAID, HAS ZANAH MEHAT AND AHMAD NASFY JJCA
21 JUNE 2021

Civil Procedure — Intervener — Right to intervene — Plaintiff filed judicial review ('JR') application for order of mandamus to enforce judgment it had obtained against defendants — Stranger applied to intervene and oppose the application — Whether stranger qualified as 'proper person to be heard' under O 53 r 8(1) of Rules of Court 2012 — Whether test of 'proper person' was whether stranger had a 'direct interest' in the proceedings — Whether 'direct interest' would be established if stranger would be bound by the court's decision in the proceedings — Whether plaintiff's application to enforce a judgment in its favour had nothing whatsoever to do with stranger

In a suit filed by the appellant against the first respondent ('R1'), the High Court decided that R1 had unlawfully acquired and taken possession of the appellant's land ('the land'). The court declared that the appellant was the beneficial owner of the land and was entitled, as against R1, to possession thereof ('the HC judgment'). The appellant, which later went under voluntary liquidation, thereafter sent a notice of demand to the first to the seventh respondents ('R1-R7') requiring them to do all things necessary to give effect to the HC judgment by ensuring that the land was transferred back into the appellant's name free of encumbrances. The respondents failed to comply. The appellant then filed a judicial review ('JR') application for an order of mandamus to compel R1-R7 to do all things necessary to ensure that the land was registered in the appellant's name. The eighth respondent ('R8') applied to intervene and oppose the application contending that the majority of the shareholders/contributories of the appellant had agreed to transfer the bulk of their shares to R8 and that they had appointed and authorised R8 to represent them to negotiate an amicable settlement between the appellant and the Federal Government. R8 contended that its interests would be directly affected by the outcome of the JR application. The appellant refuted R8's allegations and objected to its intervention. The High Court, however, allowed the intervener application holding that R8 had shown that it had a direct interest in the JR application. The instant appeal was against the High Court's decision.

Held, unanimously allowing the appeal and setting aside the intervener order:

(1) R8 had no direct interest in the proceedings to qualify as a 'proper person' under O 53 r 8(1) of the Rules of Court 2012 to intervene and oppose the JR application. The High Court judge erred in taking into account matters that were, in law, irrelevant in deciding whether R8 was a 'proper person to be heard' (see paras 7, 22 & 60).

(2) The test to determine whether R8 was a 'proper person' under O 53 r 8(1) was whether it had a direct interest. A 'direct interest' would be established where a non-party would be bound by the court's decision. In the instant case, R8 had nothing to do with the appellant's application and would not be bound by the court's decision in the mandamus application — which was the appellant seeking orders to give effect to the HC judgment by compelling R1 to transfer the land back to its name. R8 failed to show that it had any direct interest in the matter. Accordingly, its intervener application should fail (see paras 27, 43 & 58–59).

(3) The appellant was a legal entity separate and distinct from its members and the company was acting to enforce a judgment in its favour. A shareholder could not claim any right to an asset of the company. Hence, the majority of the shareholders of the appellant did not have any legal right or interest to the appellant's assets (see paras 42 & 44–45).

(4) The HC judgment was made solely in favour of the appellant. Therefore, any 'settlement' negotiations initiated by or on behalf of a shareholder of the appellant did not bind the appellant. The only party which could enter into any settlement or settlement negotiations in respect of the HC judgment was the appellant itself (see para 46).

(5) No shareholder/contributory of a company had the locus or right to interfere with the right of the company to enforce a judgment in its favour. Therefore, even if R8 — which had no legal relationship with the appellant — was a shareholder of the appellant (which, on the evidence, it was not), it did not have any locus or right to negotiate or to enter into a settlement arrangement on behalf of the appellant or to interfere with the appellant's right to enforce a judgment in its favour. The appellant asserted that it had never authorised R8 to negotiate any settlement of the HC judgment on its behalf and R8 had not adduced any evidence to contradict that assertion (see paras 49 & 51–55).

[Bahasa Malaysia summary

Dalam tindakan yang difailkan oleh perayu terhadap responden pertama ('R1'), Mahkamah Tinggi memutuskan bahawa R1 secara tidak sah memperoleh hak dan mengambil alih tanah perayu ('tanah tersebut'). Mahkamah menyatakan bahawa perayu adalah pemilik tanah benefisial dan berhak, terhadap R1, untuk memilikinya ('keputusan MT tersebut'). Perayu, yang kemudiannya digulung secara sukarela, kemudian menyerahkan notis tuntutan kepada responden pertama hingga ketujuh ('R1-R7') yang meminta

mereka melakukan kesemua perkara yang diperlukan untuk menguatkuasakan penghakiman MT dengan memastikan bahawa tanah tersebut dipindahmilik semula kepada nama perayu bebas daripada bebanan. Responden gagal mematuhinya. Perayu kemudian memfailkan permohonan semakan kehakiman ('JR') untuk satu perintah mandamus untuk memaksa R1-R7 melaksanakan kesemua perkara yang diperlukan untuk memastikan bahawa tanah tersebut didaftarkan atas nama perayu. Responden kelapan ('R8') memohon untuk mencelah dan menentang permohonan tersebut dengan berpendapat bahawa majoriti pemegang saham/penyumbang perayu telah bersetuju untuk memindahkan sebahagian besar saham mereka kepada R8 dan bahawa mereka telah melantik dan memberi kuasa kepada R8 untuk mewakili mereka kepada perundingan penyelesaian secara baik antara perayu dan Kerajaan Persekutuan. R8 berpendapat bahawa kepentingannya akan terkesan secara langsung oleh keputusan permohonan SK. Perayu membantah dakwaan R8 dan membantah pencelahannya. Mahkamah Tinggi, bagaimanapun, membenarkan permohonan mencelah dengan memutuskan bahawa R8 telah menunjukkan bahawa ia mempunyai kepentingan langsung dalam permohonan SK. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan perintah mencelah:

(1) R8 tidak mempunyai kepentingan langsung dalam prosiding tersebut untuk memenuhi syarat sebagai 'proper yang berhasrat' di bawah A 53 k 8(1) Kaedah-Kaedah Mahkamah 2012 mencelah dan menentang permohonan SK. Hakim Mahkamah Tinggi telah terkhilaf dalam mempertimbangkan perkara-perkara yang, dalam undang-undang, tidak wajar dalam memutuskan sama ada R8 adalah 'orang yang berhasrat untuk didengar' (lihat perenggan 7, 22 & 60).

(2) Ujian dalam menentukan sama ada R8 adalah 'orang yang berhasrat' di bawah O 53 k 8(1) adalah sama ada ia mempunyai kepentingan langsung. 'Kepentingan langsung' dapat dibuktikan di mana bukan pihak akan terikat dengan keputusan mahkamah. Dalam kes semasa, R8 tidak ada hubungannya dengan permohonan perayu dan tidak akan terikat dengan keputusan Mahkamah dalam permohonan mandamus — yang mana perayu memohon perintah untuk memberikan kesan pada penghakiman MT dengan memaksa R1 untuk memindahmilik tanah tersebut semula kepada namanya. R8 gagal menunjukkan bahawa ia mempunyai kepentingan langsung dalam perkara tersebut. Oleh itu, permohonan mencelah gagal (lihat perenggan 27, 43 & 58–59).

(3) Perayu adalah entity undang-undang yang berasingan dan berbeza dari anggotanya dan syarikat tersebut bertindak untuk menguatkuasakan penghakiman yang memihak kepadanya. Pemegang saham tidak dapat

menuntut hak ke atas aset syarikat. Oleh itu, majoriti pemegang saham perayu tidak mempunyai hak atau kepentingan undang-undang terhadap aset perayu (lihat perenggan 42 & 44–45).

(4) Penghakiman MT dibuat semata-mata untuk perayu. Oleh itu, sebarang rundingan 'penyelesaian' yang dimulakan oleh atau bagi pihak pemegang saham perayu tidak mengikat perayu. Satu-satunya pihak yang dapat memasukki sebarang penyelesaian atau perundingan penyelesaian berkaitan dengan penghakiman MT adalah perayu sendiri (lihat perenggan 46).

(5) Tidak ada pemegang saham/penyumbang syarikat mempunyai locus atau hak untuk campur tangan dengan hak syarikat untuk menguatkuasakan penghakiman yang memihak kepadanya. Oleh itu, walaupun R8 — yang tidak mempunyai hubungan undang-undang dengan perayu — adalah pemegang saham perayu (yang, berdasarkan keterangan, tidak), ia tidak mempunyai sebarang locus atau hak untuk berunding atau memasukki perjanjian penyelesaian bagi pihak perayu atau campur tangan dengan hak perayu untuk menguatkuasakan penghakiman yang memihak kepadanya. Perayu menegaskan bahawa pihaknya tidak pernah membenarkan R8 untuk merundingkan sebarang penyelesaian terhadap keputusan MT bagi pihaknya dan R8 tidak mengemukakan sebarang keterangan yang bertentangan dengan pernyataan tersebut (lihat perenggan 49 & 51–55).]

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417, CA (refd)

Advance Synergy Capital Sdn Bhd (formerly known as Advance Synergy Capital Bhd) v The Minister of Finance, Malaysia & Anor [2011] 6 MLJ 376, CA (refd)

American International Assurance Bhd v Coordinated Services L Design Sdn Bhd [2012] 1 MLJ 369; [2012] 1 CLJ 506, CA (folld)

Jerry WA Dusing @ Jerry W Patel & Anor v Majlis Agama Islam Wilayah Persekutuan (MAIWP) & Ors [2017] 1 MLJ 216; [2017] 1 SHLR 1, CA (refd)

Leong Yuet Heng v Chan Thai & Ors [1973] 1 MLJ 62, FC (refd)

Levy v State of Victoria and Others (1997) 146 ALR 248, HC (refd)

Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307, FC (refd)

Mega Forest Plantation Management Sdn Bhd v Pengarah Perhutanan Negeri Selangor & Ors [2021] 4 MLJ 323, CA (folld)

Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor [2018] 4 MLJ 1, FC (refd)

Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals

[2012] 3 MLJ 616; [2012] 5 CLJ 169, CA (refd)
Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177, FC (folld)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor [2010] 2 MLJ 122, HC (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150, FC (folld)

Legislation referred to

Land Acquisition Enactment (Cap 140) (repealed)
Companies Act 2016 ss 445(2), 456, Eleventh Schedule, Twelfth Schedule
Control of Rent Act 1966 (repealed by the Control of Rent (Repeal) Act 1997) s 23, 23(1)(a)
Rules of Court 2012 O 53, O 53 r 8, 8(1)

Appeal from: Application for Judicial Review No WA-25–44–02 of 2017 (High Court, Kuala Lumpur)

Ira Biswas (Janet Chai Pei Ying and Christine Lay Kei Een with her) (Chooi & Company + Cheng & Ariff) for the appellant.
Edward Ng Boon Siong (Jason Ng Kau with him) (Jason Ng & Partners) for the first respondent.
Narkunarathy Sundareson (Attorney General's Chambers) for the second respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] This is the appellant's appeal against the whole decision of the High Court made on 8 July 2019 ('intervener High Court order') allowing the eight respondent's notice of application dated 28 May 2019 under O 53 r 8 of the Rules of Court 2012 ('intervener application').

JUDICIAL REVIEW

[2] The appellant's application for Judicial Review No WA-25–44–02 of 2017 seeks orders to give effect to a judgment of the High Court dated 29 December 2009 in favour of the appellant against the first respondent in High Court Civil Suit No S-21–213 of 2003 ('mandamus application').

[3] On 13 May 2019, leave of mandamus was granted by the High Court to the appellant to compel the first to seventh respondents to:

(a) transfer and cause to be transfered the 263.272 acres of land under CT17038 Mukm Batu ('the land') to the applicant free of

A encumbrances and liabilities, including but not limited to registering the applicant as the proprietor of the land;

(b) take and cause all the necessary steps to be taken to register the applicant as the proprietor of the land, free of encumbrances and liabilities;

B (c) execute and cause to be executed all intruments of transfer necessary to effect a transfer of the land free of encumbrances and liabilities to the applicant;

(d) issue and cause to be issued documents of title to the land free of C encumbrances and liabilities in the name of the applicant;

(e) prepare, change, cancel, delete, convert and/or deliver the relevant register document(s) of title, issuing documents of title or any other register of of instruments relating to the land, including any memorial or entering in the relevant register of titles and documents so as to vest the D registered proprietorship in the land free of encumbrances in the name of the applicant; and

(f) return and cause to be returned and make all necessary directions, arrangements, preparations and/or take all necessary actions in respect E of returning any lands over posession of the land to the applicant as the lawful proprietor and owner of the land.

THE INTERVENER APPLICATION

F **[4]** The intervener application is for, inter alia, leave to intervene in the appellant's mandamus application under O 53 r 8 of the ROC. The application is premised on the claim that the eight respondent is a proper person to intervene in the appellant's application for judicial review and be added as the eight respondent. The eight respondent claims that the majority G shareholders/contributories of the appellant have agreed to transfer 50% of its share to the eight respondent and appointed and authorised the eight respondent on behalf of the shareholders/contributories to negotiate a settlement between the appellant and the Federal Government.

H **[5]** The appellant denied the allegations and objected to the intervener application. The objection is premised on the ground that the eight respondent has no legal relationship with the appellant and has no right to interfere with the appellant's actions to give effect to the judgment in the appellants favour.

I **[6]** The High Court granted leave to the eight respondent to intervene in the appellant's application for judicial review under O 53 r 8 of the Rules of Court 2012 as a proper person and be added as the eight respondent ('intervener High Court order').

THE APPEAL

[7] The appeal concerns the decision of the intervener High Court order which came before us. Having heard the appellant's appeal and considered the oral submissons and the written submissions by the appellant's and the eight respondent's counsels, the SFC representing the first to seventh respondents abstain from making any submissions, we find there is merit in the appellant's appeal. We are satisfied that the eight respondent has no direct interest in the appellant's action and therefore is not a proper person under O 53 r 8 of the Rules of Court 2012 to intervene.

[8] It is our unanimous decision that the appellant's appeal is allowed with costs of RM10,000 subject to allocatur against the eight respondent. The intervener High Court order is set aside.

[9] We give our reasons.

MATERIAL FACTS

[10] The first respondent had taken 263.272 acres of the land belonging to the appellant held under CT17038 Mukim of Batu purportedly under the Land Acquisition Enactment (Cap 140) (since repealed in 1960). After the first respondent took possession of the land, it was divided into 38 titles and registered in the name of the Federal Lands Commissioner.

[11] The appellant filed an action (High Court Civil Suit No S7–21–213 of 2003) against the first respondent in trespass and succeeded as the High Court held that the first respondent had unlawfully taken the land and that the purported acquisition was null and void ('High Court judgment').

[12] The judgment was pronounced on 29 December 2009 in favour of the appellant and ordered as follows:

(a) that the appellant retained its beneficial interest in the land of which the first respondent had through its servants and/or agents taken unlawful possession of and that the appellant was entitled as against the first respondent to possession thereof;

(b) That the first respondent pay the appellant mesne profits as damages for trespass, to be assessed by the senior assistant registrar; and

(c) that the first respondent pay to the appellant costs forthwith.

[13] The judgment was affirmed by the Court of Appeal on 18 May 2012 ('Court of Appeal order'). The first respondent's application for leave to appeal

to the Federal Court against the Court of Appeal order was dismissed on 21 November 2012 ('Federal Court dismissal of leave order').

[14] Further, on 22 November 2018, the Federal Court dismissed the first respondent's application for a review of the said decision of the Federal Court dated 21 November 2012 ('Federal Court dismissal of review order').

[15] On 17 February 2017, the appellant, through its then solicitors Messrs Chooi & Company, issued a demand for the first to seventh respondents to give effect to Order No 1 of the judgment ('demand').

[16] The first to seventh respondents failed, refused and/or neglected to comply with the demand or to do all such things as may be necessary to give effect to order No 1 of the judgment resulting in the appellant taking out of the mandamus application ie the appellant's judicial review application for leave to issue an application for orders of mandamus on 27 February 2017.

[17] On 13 May 2019, the High Court granted the appellant leave to issue an application for orders of mandamus in the mandamus application. Subsequently, the appellant filed a notice of hearing of application of judicial review for mandamus on 23 May 2019. On 30 May 2019, the eight respondent served the intervener application to intervene in the mandamus application to the appellant.

DECISION OF THE HIGH COURT

[18] The learned HCJ in arriving at his decision, having deliberated the relevant cases and O 53 r 8(1) of the Rules of Court 2012 held that the eight respondent is the proper person to be included as a party to the proceedings on the grounds that:

(a) the majority shareholders/contributories of the appellant desired to grant the rights, benefits and interests of total 54.5% of their shares to the eight respondent;

(b) the majority shareholders/contributories of the appellant inclined in favour of the eight respondent in resolving the dispute concerning the disputed land in an amicable manner which has prolonged for more than 60 years between the appellant and the respondents; and

(c) pursuant to the delegation to the eight respondent, the outcome of the JR application which affects the majority shareholders/contributories of the appellant and as a consequence thereof, affecting the eight respondent representing the interest of majority

shareholders/contributories of the appellant show that the eight respondent has direct interest in the mandamus orders sought in the JR application.

GROUNDS OF APPEAL

[19] The appellant has raised 11 grounds of appeal in its memorandum of appeal (see CCB2 at pp 37–42).

APPELLATE INTERFERENCE

[20] The law for appellate intervention has been well established where an appellate court is generally slow to interfere a lower court's decision, except under circumstance, inter alia, where the lower court's discretion had been exercised based on wrong principles and should have been exercised in a contrary way or that there has been a miscarriage of justice (see *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 at p 151 (FC).

[21] In our judgment, the same principle should apply that the duties of an appellate court in such matter as this are, confined to those normally exercisable where the lower court has a discretion.

[22] In the present case, we are justified in interfering with the decision of the learned HCJ and set aside the order of the High Court on the ground that the learned HCJ has taken into account matters that are in law irrelevant when deciding that the eight respondent is a proper person having direct interest in the mandamus orders sought in the judicial review application. We are satisfied that the learned HCJ failed to act judiciously and fairly in arriving at his decision and therefore had erred in fact or in law.

THE POSITION IN LAW

[23] As correctly held by the learned HCJ and submitted by both parties in this appeal that there is a specific framework for the determination of applications for judicial review, whereby O 53 r 8(1) of the Rules of Court 2012 specifically drafted to cater for persons claiming an interest in a judicial review proceeding who wish to be heard in opposition. It reads:

> (1) Upon the hearing of an application for judicial review, any person who desire to be heard in opposition to the application and appears to the Judge to be a proper person to be heard may be heard not withstanding that he has not been served with the cause papers in the matter.

[24] In this respect, there are plethora of cases on the test to determine whether a party is a proper person and it will be suffice to cull and refer to a few

to restate the well established principle. In the landmark case of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307 at pp 319–320, the Federal Court was of the view that the phrase 'proper person' stipulated in O 53 r 8(1) of the Rules of Court 2012 must be read as referring to persons with direct interest. It is significant that the party not having any direct interest will not be allowed to be joined as a party, particularly in judicial review proceedings.

[25] The legal principle enunciated in the case of *Majlis Agama Islam Selangor* was adopted in the Court of Appeal case of *Advance Synergy Capital Sdn Bhd (formerly known as Advance Synergy Capital Bhd) v The Minister of Finance, Malaysia & Anor* [2011] 6 MLJ 376 at pp 385–386, where the judgment given by Justice Low Hop Bing (as he then was) at paras [26]–[28] is reproduced herein:

> [26] In addition, O 53 r 8(1) confers upon the judge a *wide discretion to hear a proper party or person in opposition to an application for judicial review* so long as the conditions contained therein have been fulfilled, viz:
>
> (a) the person desires to be heard in opposition to the application; and
>
> (b) that person appears to the judge to be a proper person to be heard, notwithstanding that he has not been served with the cause papers in the matter.
>
> [27] In the instant appeal, *so long as the judge has demonstrated a proper exercise of discretion under* O 53 r 8(1), on the basis of the facts and circumstances prevailing in each particular case, and established judicial principles, *this court would be slow in embarking on an appellate interference.* (Emphasis added.)
>
> [28] ... In the context herein, *justice and fairness dictate the necessary inclusion* of the second respondent as a party to *canvass their opposition on a subject matter directly affecting their interest.*

[26] Having outlined the principle relating to intervention in a judicial review proceeding, it is well noted that the courts take a liberal approach in granting leave to a non-party with direct interest to intervene in a judicial review proceeding, and exclude indirect interest.

[27] In this respect, the test to determine whether the eight respondent is a proper person to be heard, is whether the eight respondent has direct interest.

DECISION OF THIS COURT

[28] Apart from the case of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307, which held that a 'proper person' under O 53 r 8(1) of the ROC refers to a party with direct interest, the case of *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor* [2010] 2

MLJ 122 at para 5 pp 126–127 similarly held that in order to qualify under O 53 r 8(1) of the Rules of Court 2012, an applicant must show a direct interest. In dismissing the applicant's application to intervene under O 53, it was held that the applicants had nothing to do with the decision under challenge in the judicial review proceedings as the applicants were not involved in the decision nor can they claim that they ought to have been involved.

[29] To determine whether the eight respondent has a direct interest so as to be entitled as a proper person to be heard, we have to look into the meaning of 'direct interest'. In this regard, the Court of Appeal in the case of *Jerry WA Dusing @ Jerry W Patel & Anor v Majlis Agama Islam Wilayah Persekutuan (MAIWP) & Ors* [2017] 1 MLJ 216; [2017] 1 SHLR 1 at p 16 has made reference to the Australia High Court case of *Levy v State of Victoria and Others* (1997) 146 ALR 248, where Brennan CJ explained the difference between direct and indirect interests and the corresponding scope of the right to intervene. A direct interest is established where a non-party will be bound by the court's decision, and accordingly, intervention must be permitted to protect their interests.

[30] The eight respondent's case is that the majority shareholders of the appellant have given efforts to attain a global settlement with the first respondent. On or around September 2017, the majority shareholders of the appellant have requested the liquidators to convene a meeting for the purpose of approving the proposed global settlement to be submitted to the first respondent. As such, mandate has been granted to the liquidators for negotiation of the settlement agreement.

[31] The eight respondent alleged that the liquidators were at all material times, well aware of the intention of the majority shareholders of the appellant to enter into a global settlement with the first respondent. However, the mandate period granted to the liquidators by the shareholders for negotiations of the proposed global settlement lapsed on 31 December 2017 without any settlement proposal for deliberation of shareholder and/or contributories nor any proposal submitted to the first respondent for approval.

[32] The eight respondent alleged that there was no effort made by the liquidators to achieve a settlement between the parties since the day when mandate was granted to the liquidators. In thier view, the liquidators have failed and/or neglected in fulfilling their duties and obligations posed on them.

[33] Thereafter, the majority shareholders of the appellant has agreed in principle to sell 54.5% of their shares to the eight respondent. Despite that the

eight respondent had not retained ownership to the shares, the eight respondent has nevertheless acquires the rights, benefits and interests in the shares.

[34] The eight respondent submitted that the direct interest of the eight respondent accrues not solely as mere beneficial ownership to the shares, but for the fact that the eight respondent representing the majority interest of the appellant is in the middle of resolving the long legal battle between the appellant and the respondents by negotiating and facilitating a prospective settlement pertaining to the disputed land in question as directed and mandated by the majority shareholders/contributories of the appellant.

[35] It follows therefore that the outcome of the judicial review application will certainly leave an impact on the eight respondent. Thus, whether the judicial review application were to succeed, the eight respondent's interest will be affected and this warrants an intervention by the eight respondent to protect his legal right and interest.

[36] Further and/or alternatively, the eight respondent is negotiating on the settlement agreement with the respondents and other related parties to resolve the enduring issues of the disputed land, the ongoing judicial review application would directly and potentially jeopardize the process and outcome of the negotiation of the settlement agreement.

[37] The eight respondent further submitted that, it was well within the knowledge of the liquidators that the majority shareholders of the appellant had convened meetings and agreed with the proposal of the eight respondent. Resulting from the meetings, the eight respondent has successfully procured financial assistance of EUR1 billion as of 3 July 2019 for the purpose of a global settlement between the parties in this proceeding. In the circumstances, the financial interest goes to the root of the interest of the proceeding before this honourable court.

[38] In furtherance of that, there was no meetings convened by the liquidators with the shareholders neither to oppose the involvement of the eight respondent to negotiate the settlement agreement with the first respondent nor to oppose the eight respondent's application to intervene. It is unjust for the appellant to now challenge the legal standing of the eight respondent to intervene in the judicial review proceeding.

[39] In the first place this case is about the appellant's mandamus application. The order of mandamus is a command issued by the High Court asking an authority to perform a public duty imposed upon it by law. For example, when an authority omits to decide a matter which it is bound to

decide under the law, mandamus can be issued directing it to decide the same. Mandamus can be granted only when a legal duty is imposed on an authority and the applicant has a legal right to compel the performance of the public duty prescribed by law, and to keep the surbordinate bodies and officers, exercising public functions witin the limits of their jurisdiction.

[40] In *Leong Yuet Heng v Chan Thai & Ors* [1973] 1 MLJ 62), Madame Chan Tai applied to Kuala Lumpur Rent Tribunal for certificate under s 23(1)(a) certifying that certain premises had ceased to be controlled premises. The Rent Tribunal dismissed her application. She appealed to Kuala Lumpur Rent Appeal Board. The board held that it did not have the jurisdiction to entertain the appeal and accordingly dismissed it. She appealed to Kuala Lumpur High Court for an order of certiorari to quash the Rent Tribunal board's order and for an order of mandamus directing the board to hear and determine her appeal. The High Court holding that a decision of the tribunal under s 23 could be appealed to the board, ordered that the board's order be quashed and commanded the board to hear and determine the appeal. The appellant appealed to the Federal Court. In dismissing the appeal, the Federal Court held that there is a right of appeal from a decision of the Rent Tribunal under s 23 to the Rent Appeal Board and therefore, the learned judge was right in issuing the orders of certiorari and mandamus.

[41] In the present case the appellant's mandamus application is against the first to seventh respondents and not against the eight respondent. The appellant denied the allegations of the eight respondent. The appellant submitted that the eight respondent is not a proper person to be heard in the mandamus application as it has no direct interest so as to be permitted to be heard in the mandamus application under O 53 r 8(1) of the Rules of Court 2012.

[42] As alludded to earlier the judgment of the High Court has pronounced and ordered that the appellant retained its beneficial interest in the land of which the first respondent had through its servants and/or agents taken unlawful possession of and that the appellant was entitled as against the first respondent to possession thereof. Rightly, the applicant has a legal right to compel the performance of the first respondent's public duty under the law to hand posession over the land and/or register the applicant as the proprietor of the said land. The appellant is involved in a voluntary winding up and also rightly acting through it liquidators which has and can enforce the rights to the land upon which the mandamus application is premised. In the premise, the majority shareholders did not have legal right or legal interest to the assets of the company.

[43] We do not agree with the eight respondent's submission that the direct interest of the eight respondent accrues on the fact that the eight respondent representing the majority interest of the appellant is in the middle of resolving the long legal battle between the appellant and the respondents. It has been said earlier that a direct interest is established where a non-party will be bound by the court's decision, and accordingly, intervention must be permitted to protect their interests. In the present case, we are of the view that the eight respondent will not be bound by the court's decision in the appellant's mandamus application to seek orders to give effect to a judgment of the High Court dated 29 December 2009.

[44] As correctly pointed out that the appellant is a separate legal entity. It is trite law that a company is a legal entity separate and distinct from its members and it is the company which acts upon a judgment in its favour (see *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor* [2018] 4 MLJ 1 at para 42 p 15; *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 at para 8-C p 429; *Mega Forest Plantation Management Sdn Bhd v Pengarah Perhutanan Negeri Selangor & Ors* [2021] 4 MLJ 323 (CA) at para 84).

[45] In the *Mega Forest* case, the Court of Appeal held that a shareholder of a company whose purported assets were the subject of a judicial review application had no locus standi to commence judicial review proceedings. The Court of Appeal cited and adopted the finding in the case of *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616; [2012] 5 CLJ 169 where it was held that it is a cornerstone of company law that a company is a separate legal entity and as such a shareholder cannot claim any right to any asset of the company. Thus, as a matter of law; the appellant in *Mega Forest*, being majority shareholder did not have legal right or legal interest to the assets of the company.

[46] It is undisputed that the judgment was made in favour of the appellant solely. Therefore, any 'settlement' negotiations initiated by or on behalf of a shareholder of the appellant do not bind the appellant. The only party which can enter into any settlement or settlement negotiations in respect of the judgment is the appellant, which acts through its liquidators as it is in a members voluntary winding up.

[47] We agree with the appellant that even the directors of the company in liquidation do not have the power to act on behalf of the company save as consented to or sanctioned by the liquidator of the company. This is set out in s 445(2) of the Companies Act 2016 which provides:

On the appointment of a liquidator, all the powers of the directors cease, except so far as the company in general meeting with consent of the liquidator, or the liquidator sanctions the continuance of all the powers of the directors.

[48] The appellant refers to the following cases in support:

(a) before a liquidation — in the case of *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177 (FC) at paras 108 and 118 pp 190 and 193, it was held that the powers of management of a company are vested in the directors and not the shareholders;

(b) after a liquidation — in the case of *American International Assurance Bhd v Coordinated Services L Design Sdn Bhd* [2012] 1 MLJ 369; [2012] 1 CLJ 506 (CA) at para 25, it was held that once a company is wound up, the board of directors of the company becomes *functus officio*. The liquidator displaces the directors and the control of the activities of the company is vested with the liquidator. No one but the liquidator can act for the company. The directors will not be able to act on behalf of the company once the company is wound up; and

(c) after a liquidation — in the case of *Mega Forest* at paras 82–85, the Court of Appeal held that the principle that shareholders have no legal interest in the assets of the company, is trite, and as the company had been wound up, it is for the liquidator to take any action as he thinks fit (para 87).

[49] Based on the authorities above, we agree that no shareholder/contributory of a company has the locus or right to interfere with the right of the company to enforce judgments in its favour. Therefore, it is clear that a person such as the eight respondent who has no legal relationship with the appellant has no locus or right to interfere with the right of the company to enforce judgments in its favour.

[50] In fact, when a company is in liquidation, under para 1 of the Eleventh Schedule of the Companies Act 2016 read with para 1 of the Twelfth Schedule, compromises as provided therein can only be decided by not less than 75% of the shareholders/contributories of the company (see s 456 of the Companies Act 2016 which provides for the powers of liquidator in a voluntary winding up; Eleventh Schedule of the Companies Act 2016 and Twelfth Schedule of the Companies Act 2016).

[51] In our considered view, even if the eight respondent is a shareholder of the appellant it does not have any locus or right to negotiate any settlement

A and/or enter into settlement arrangement on behalf of the appellant; or interfere with the right of the appellant company to enforce judgments in its favour for that matter.

B **[52]** The eight respondent is not even a shareholder/contributory of the appellant (paras 6(d) and 10 of the appellant's affidavit affirmed on 21 June 2019 and 24 June 2019 at CCB 1 pp 248 and 249 and para 15 of the appellant's affidavit affirmed on 3 July 2019 at CCB1 p 202).

C **[53]** In fact, the liquidators of the appellant were informed that there was no completion of the alleged sale by the alleged vendors of the shares to the eight respondent. Certainly, there was no registration of the eight respondent as a shareholder of the appellant (para 6(d) of the appellant's affidavit affirmed on 21 June 2019 and 24 June 2019 at CCB1 p 248 and para 15 of the appellant's affidavit affirmed on 3 July 2019 p 202).

D

[54] The appellant contended that at no time has the appellant authorised the eight respondent to negotiate any settlement of the judgment on its behalf, and the eight respondent has not adduced any evidence to prove its allegation

E (para 7 of the appellant's affidavit affirmed on 21 June 2019 and 24 June 2019 at CCB 1 p 248 and para 7 (c) of the appellant's affidavit affirmed on 3 July 2019 at CCB 1 p 201).

[55] The appellant submitted that the learned judge's finding that the eight

F respondent had a direct interest was based on the letter dated 15 May 2018 from Ng Lu Siang (one of the appellant's shareholders) to the Prime Minister's Office set out in para 16 of his judgment. However, contrary to the learned Judge's findings in paragraph 16, the said letter dated 15 May 2018 (which was disputed by the appellant) does not give the eight respondent any mandate or

G authority to negotiate a settlement of the judgment on behalf of the appellant as the appellant has not authorised appointed or mandated the eight respondent to negotiate, facilitate or enter into any settlement of the judgment on behalf of the appellant.

H **[56]** As for the contents of the letter dated 15 May 2018 being disputed, contrary to the finding of the learned judge, the contents of the letter dated 15 May 2018 were in fact disputed by the appellant (paras 7 and 10 of the liquidators' affidavit affirmed on 21 June 2019 and 24 June 2019, and para 7(b) and 7(c) of the liquidators' affidavit affirmed on 3 July 2019), where

I the appellant expressly did not admit the contents of para 6 of the eight respondent's affidavit affirmed on 28 May 2019 and denied all averments therein and stated that no authority was given by the appellant to the eight respondent, and secondly by the fact that there was no completion of the alleged sale of any shares in the appellant to the eight respondent.

[57] We discovered that all the three impugned letters which dated on the same date ie on 15 May 2018 were written to Tun Dr Mahathir bin Mohamad (as he was the PM then) immediately after Dr Mahathir became Prime Minister. We notice that this episode only started or initiated during this point of time. The letters are, inter alia, purportedly informing the PM that the majority shareholders has agreed and signed the share transfer agreement of 54.5% (majority) with the eight respondent and appointed the eight respondent to represent them and be responsible to continue negotiation with the Federal Government for settlement. As correctly contended by the appellant, there is no prove of any approval or mandate from the appellant for the negotiation or setlement.

[58] On the facts, the eight respondent had nothing to do with the decision under challenge in the judicial review proceedings as the eight respondent was not involved in the decision nor can they claim that they ought to have been involved in given effect to the judgment. The mandamus application is only seeking orders to give effect to a judgment of the High Court dated 29 December 2009 in favour of the appellant against the first respondent and essentially to transfer the land belonging to the appellant to give effect to the judgment. In other words, to compel the performance of the public duty prescribed by law ie the first respondent to transfer the land back to the appellant.

[59] Given the matters above, it is our considered view that the eight respondent has failed to show or establish any direct interest to be allowed to be heard in the mandamus application under O 53 r 8(1) of the Rules of Court 2012 or to provide any basis which would support an application made under O 53 r 8(1) of the Rules of Court 2012 as a proper person. The eight respondent should not be allowed to be joined as a party, in judicial review proceedings.

CONCLUSION

[60] In conclusion it is our unanimous decision that the appeal should be allowed for the reasons summarised as follows:

(a) under O 53 r 8(1) of the Rules of Court 2012, the only persons who can intervene in a judicial review application to be heard in opposition to the judicial review application are those who qualify as 'proper persons';

(b) a proper person is one who has a direct interest in the proceedings;

(c) the eight respondent has no direct interest in the proceedings and is not a proper person under O 53 r 8(1) of the Rules of Court 2012;

(d) the eight respondent, who is not a shareholder/contributory of the appellant but which claims it has purchased shares in the appellant company from shareholders/contributories of the appellant is a stranger to the judgment and the mandamus application and is not a proper person to be heard in opposition to the mandamus application pursuant to O 53 r 8(1) of the Rules of Court 2012;

(e) the eight respondent has no direct interest in the mandamus application as:

(i) the eight respondent has no legal relationship with the appellant;

(ii) the eight respondent has no right or authority to enforce the judgment;

(iii) the eight respondent has no right to interfere with the appellant's actions to give effect to the judgment in the appellant's favour;

(iv) the eight respondent has no right or authority to negotiate a settlement of the judgment on behalf of the appellant and seek to intervene in the mandamus application on that basis;

(v) even if the eight respondent was a shareholder/contributory of the appellant (which it is not), it does not have the right or authority to enforce the judgment or negotiate a settlement of the same on behalf of the appellant as no shareholder/contributory of a company has the right to do so; and

(vi) the eight respondent, who is in any event not a shareholder/contributory of the appellant, was not appointed by the appellant to negotiate a settlement of the judgment which is the subject matter of the mandamus application.

[61] We allowed the appeal with cost of RM10,000 to the appellant against the eight respondent subject to allocatur. The intervener High Court order 8 July 2019 is set aside.

Appeal allowed with costs, subject to allocatur.

Reported by Ashok Kumar